IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO.6938 OF 2005

Ajnkyatara Sahakari Sakhar Karkhana Ltd. : Petitioner

V/s.

ICICI Bank Limited & Ors. : Respondents

...

Mr.Prateek Saksaria i/b. Mr.Viraj Maniar Associates for the petitioner.

Mr.Ravi Kadam, Advocate General, with Mr.Birendra Saraf, Mr.Vikram Trivedi, Mr.Sachin Chandarana and Mr.Samrat Rasal i/b. Manilal Kher Ambalal for the respondent no.1.

...

**CORAM : S.A. BOBDE, J.**

October 11, 2005.

P.C.:

1. By this petition under Article 227 of the Constitution of India, the petitioner has challenged the judgement dated 13.9.2005 by which the learned Addl. District Judge, Satara, has refused an injunction to the petitioner

for restraining the respondent no.1, ICICI Bank Limited, from invoking the Bank guarantee executed by the respondent no.2, The United Western Bank Ltd., in favour of the ICICI Bank Ltd.

2. The petitioner is a sugar factory. It entered into a contract for supply of 1,80,000 quintals of sugar to the respondent no.3, Hindustan Coca-Cola Beverages Pvt. Ltd., which incidentally is not a party to the instant suit, under a Master Purchase Order dated 1.10.2003. The respondent no.1, ICICI Bank Ltd., is admittedly not a party to the contract for supply of sugar.

3. The contract of the petitioner with the ICICI Bank Ltd. is as follows:-

In pursuance of a Memorandum of Understanding entered into sometime on 1.10.2003, ICICI Bank Ltd., issued a credit arrangement letter dated 23.12.2003 whereunder it agreed to give credit in the sum of Rs.19,91,74,643/-, subject to the general terms and conditions set out in the annexure to the said letter. The first annexure to the letter sets out the terms and conditions. One of the terms is that the tenure of the credit facility would be for a period of 11 months. The

term relating to payment mechanism reads as follows:-

> "The payments from HCC (i.e. Hindustan Coca-Cola Beverages Pvt. Ltd. would be routed through a designated A/C. All payments from HCC to be made in the name of "ICICI Bank A/c. Ajinkyatara Sahakari Sakhar Karkhana Limited (A/c.No.).
>
> ASSKL (the petitioner) shall agree to route payments from HCC through the designated account with the Bank by way of an arrangement between ASSKL and ICICI Bank. The account shall be debited from time to time for collection of interest and principal. In case, the amount is insufficient for meeting such liabilities to the Bank, ASSKL shall arrange to make necessary funds available through their own sources."

The term relating to Default Event reads as follows:-

> "In case the HCC/ASSKL fail to pay principal/interest within 30 days from the

due date, the same will be treated as default and the Bank Guarantee will be invoked."

Schedule ‘A’ to the terms and conditions is as under:-

| "Date | Quantity | Installment | Interest | Prin Repaid | Prin O/s |
|---|---|---|---|---|---|
| 31-Dec-03 | 500 | 5,737,260 | 204,631* | 5,532,629 | 193,642,014 |
| 31-Jan-04 | 1300 | 15,412,730 | 1,027,894 | 14,384,835 | 179,257,179 |
| 29-Feb-04 | 1900 | 21,914,137 | 890,147 | 21,023,990 | 158,233,189 |
| 31-Mar-04 | 2300 | 26,290,030 | 839,936 | 25,450,093 | 132,783.095 |
| 30-Apr-04 | 2100 | 23,919,147 | 682,105 | 23,237,042 | 109,546,054 |
| 31-May-04 | 2100 | 23,818,536 | 581,494 | 23,237,042 | 86,309,012 |
| 30-Jun-04 | 2100 | 23,680,410 | 443,368 | 23,237,042 | 63,071,970 |
| 31-Jul-04 | 1100 | 12,506,584 | 334,800 | 12,171,784 | 50,900,187 |
| 31-Aug-04 | 1500 | 16,868,076 | 270,189 | 16,597,887 | 34,302,300 |
| 30-Sep-04 | 1600 | 17,880,623 | 176,210 | 17,704,413 | 16,597,887 |
| 31-Oct-04 | 1500 | 16,685,992 | 88,105 | 16,597,887 | |

* would be finalized based on the date of disbursement."

4. After this credit arrangement letter, another agreement dated 30.12.2003 was executed by the respondent no.1, ICICI Bank Ltd., with the petitioner. Clause 2.1 of

the agreement reads as follows:-

> "2.1 AMOUNT
>
> The Company agrees to borrow from ICICI Bank and ICICI Bank agrees to lend to the Company, on the terms and conditions contained herein as also in the General Conditions, for the purpose of MANUFACTURING SUGAR TO BE SUPPLIED TO HINDUSTAN COCA-COLA BEVERAGES PVT. LTD. (the "Purpose") a rupee term loan not exceeding Rs.199.2 million (the "Facility").

At the end of this agreement, the terms and conditions specified in the credit arrangement letter dated 23.12.2003 referred to above are reiterated as condition of this agreement.

5. In pursuance of this, five Bank guarantees were given by the respondent no.2, The United Western Bank Ltd., as follows:-

| S.No. | Date of Commencement | Date of Expiry | Quantity in quintals | 85% Amount |
|---|---|---|---|---|
| 1. | 1.12.2003 | 31.3.2004 | 37,000 | 4,09,41,454.00 |

| | | | | |
|---|---|---|---|---|
| 2. | 1.1.2003 | 31.5.2004 | 44,000 | 4,86,87,135.00 |
| 3. | 1.12.2003 | 31.7.2004 | 42,000 | 4,64,74,083.00 |
| 4. | 1.12.2003 | 30.9.2004 | 26,000 | 2,87,69,671.00 |
| 5. | 1.12.2003 | 30.11.2004 | 31,000 | 3,43,02,300.00 |

This dispute is about the last two guarantees. The relevant item of the Bank guarantee executed by The United Western Bank Ltd. refers to the agreement by the respondent no.1, ICICI Bank Ltd. to advance the sum of Rs.19,91,74,643/- and that the amount is to be liquidated by Hindustan Coca-Cola Beverages Pvt. Ltd. by depositing cheques against supplies effected by the petitioner. This is contained in the recitals. The terms of guarantee are as follows:-

> "1. We The United Western Bank Ltd., Godoli Branch, Satara hereby Irrevocably and unconditionally guarantee to you the due payment/repayment by the Ajinkyatara Sahakari Sakhar Karkhana Ltd., of all amounts payable to you under the Agreement in the event of any default by the Ajinkyatara Sahakari Sakhar Karkhana Ltd., of any of the terms of the Agreement we hereby

> irrevocably and unconditionally guarantee (as primary obligor and not merely as surety) and undertake to pay on demand forthwith to your Bank upon default by the Ajinkyatara Sahakari Sakhar Karkhana Ltd., of any or all monies payable by the Ajinkyatara Sahakari Sakhar Karkhana Ltd., to extent of INR 28,769,671.00 (Indian Rupees Two crore eighty seven lacs sixty nine thousand six hundred seventy one only) in aggregate ..... reservation, recourse or protest. Any such written demand as above made by you on us shall be final, conclusive and binding not withstanding any difference of any dispute/arbitration, pending before any Court, Tribunal Arbitrator or any other authority."

6. It appears that the petitioner defaulted in making certain payment. According to the respondent no.1, ICICI Bank Ltd., an amount of Rs.7,56,23,816.40 was outstanding from the petitioner, inclusive of interest upto 30.11.2004. They, therefore, invoked the Bank guarantees

nos.4 and 5, the total of which was a sum lesser than the amount outstanding against the petitioner, according to the ICICI Bank.

7. The petitioner, upon receiving notice of the invocation, filed Regular Civil Suit no.491/04 on 26.12.2004. In that suit, the petitioner sought an injunction. The application for temporary injunction was rejected on 21.7.2005.

8. Against the refusal of the trial Court to grant an injunction, the petitioner carried an appeal to the District Judge, Satara, who dismissed the appeal by the impugned judgement dated 13.9.2005.

9. Mr.Saksaria, the learned counsel for the petitioner, submitted that the learned District Judge has committed an error in ignoring the fact that due dates were liable to be determined according to the master purchase order for sugar placed by the respondent no.3 on the petitioner. According to him, the master purchase order dated 8.10.2003 whereunder the obligation to pay the principal liability to the ICICI Bank Ltd. is cast on the buyer, the respondent no.3 Hindustan Coca-Cola Beverages Pvt. Ltd. The learned counsel further submits that the learned

District Judge also failed to take into account the recital in the Bank guarantee that the amount financed by the ICICI Bank Ltd. is to be liquidated by the respondent no.3. i.e. Hindustan Coca-Cola Beverages Pvt. Ltd. by depositing cheques against the supplies effected by the petitioner.

10. I see no merit in either of these contentions, in view of the fact that the master purchase order governs the transaction of supply of sugar by the petitioner to the respondent no.3, Hindustan Coca-Cola Beverages Pvt. Ltd. The respondent no.1, ICICI Bank Ltd., is not a party to it. Any obligation cast on the respondent no.3 to repay any advance or loan taken by the petitioner cannot relieve the petitioner from its obligation to repay the amount due. Undoubtedly, while obtaining the credit facility from the respondent no.1-Bank, the petitioner has agreed "to make necessary funds available through their own sources," in case the amount which is paid by Hindustan Coca-Cola Beverages Pvt. Ltd. in the account opened with the respondent no.1, ICICI Bank Ltd., is insufficient vide the terms and conditions of credit arrangement letter dated 23.12.2003 reproduced above. In any case, non-performance of an obligation in relation to the underlying contract between the petitioner and Hindustan

Coco-Cola Beverages Pvt. Ltd. cannot be pleaded in defence by the petitioner in the circumstances of this case, particularly in view of an express condition in the Bank guarantee that the amount shall be payable by The United Western Bank Ltd. "in the event of any default by Ajinkyatara Sahakari Sakhar Karkhana Ltd. of any of the terms of the agreement". The Bank Guarantee is irrevocable and unconditional. Several clauses reiterate the promise of The United Western Bank Ltd. to pay the amount, in case of any default by the petitioner.

11. It was also contended on behalf of the petitioner that no date for payment of any amount by the petitioner to the respondent no.1, ICICI Bank Ltd., is fixed and no default has occurred. This contention is plainly misconceived in view of the fact that Schedule ‘A’ reproduced above has specifically incorporated under the Corporate Rupee Loan Facility Agreement dated 30.12.2003 referred to above. In view of the above, I am of view that the learned appellate Court has rightly relied upon the judgement of this Court in Kisan Sahakari Chini Mills Ltd. v. Richardson & Cruddas (1972) Ltd. (AIR 1977 Bombay 35) which in turn has considered the settled position in law in relation to invocation of Bank guarantees.

12. Mr.Kadam, the learned Advocate General appearing for the respondent no.1-Bank, has relied on the decision in Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd. [(1997) 6 SCC 450] and U.P. State Sugar Corporation v. Sumac International Ltd. [(1997) 1 SCC 568]. I am of view that in view of the law laid down by the Supreme Court in the above said decisions, the order of the learned District Judge is not liable to be interfered with. There is no merit in the petition which is hereby dismissed.

13. At this stage, Mr.Saksaria, the learned counsel for the petitioner, prays for continuation of the injunction on the ground that it has been in force since January 2005. This request is opposed on behalf of the respondent. Having regard to the clear and unequivocal terms referred to above and the transaction between the parties, I do not consider it appropriate to continue the injunction.

S.A. BOBDE, J.